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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CONRAD GOMEZ BOLSTER, Defendant and Appellant.	H045322 (Santa Clara County Super. Ct. No. C1648102)

I. INTRODUCTION

Defendant Conrad Gomez Bolster was convicted after jury trial of possession for sale of 3,4-methylenedioxymethamphetamine (MDMA) (Health & Saf. Code, § 11378).[1] The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions. The court also ordered defendant to pay various fines, fees, and assessments.

On appeal, defendant contends that a probation condition subjecting his electronic devices to search is unconstitutionally overbroad. He also argues that there is not substantial evidence that he has the ability to pay a $150 drug program fee (§ 11372.7) and a $25 per month probation supervision fee (Pen. Code, § 1203.1b), which were

[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

imposed by the trial court. Defendant further argues that, based on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court violated his due process rights under the California and federal Constitutions by failing to make an ability-to-pay determination before imposing these and other monetary obligations.

For reasons that we will explain, we will affirm the order of probation.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

In October 2017, defendant was charged by first amended information with possession for sale of MDMA (§ 11378; count 1) and misdemeanor possession for sale of marijuana (§ 11359, subd. (b); count 2).

B. *The Jury Trial*

MDMA is a stimulant that is usually in pill form. One pill is approximately one dose. Ecstasy is a street name for MDMA. People who sell MDMA may also use it. Circumstances indicting that a person possesses a drug for sale include the quantity possessed and the possession of cash, scales, packaging materials, and multiple cell phones. Regarding multiple cell phones, depending on the level of drug sales a person is engaged in, the person may have a separate "business phone" to receive "business calls."

On the evening of August 20, 2016, in response to a call for police service, the police made contact with defendant, who was with a female in a parked vehicle. The police eventually searched the vehicle.

A backpack in the vehicle contained the following items. There was a bag with three pills of MDMA, a jar with papers that are commonly used for wrapping marijuana cigarettes, and a "marijuana grinder" that is used for grinding marijuana buds to roll a marijuana cigarette. There were more than 100 unused baggies in different sizes. There were also two digital scales and two cell phones, a Samsung and an iPhone, belonging to defendant. Defendant's social security card and a bank receipt with his name were also in the backpack. The bank receipt reflected that several personal checks, totaling more

than $10,000, were cashed a few days prior. There was also a paper with bank transaction markings on it. The paper is used by banks to package cash that is withdrawn by a customer. The backpack also contained two ziplock bags with $100 bills totaling approximately $5,700 in one ziplock bag and approximately $1,900 in the other ziplock bag.

Underneath the backpack was a glass Mason jar containing approximately two grams of marijuana. A third digital scale was found in the vehicle's glove box. In the trunk of the vehicle were jars and containers that contained the residue of dried marijuana. There was also a bong.

Defendant had approximately $2,200 in his wallet, consisting of $20 and $100 bills. A third cell phone, an iPhone, was found on defendant.

The cell phones contained text messages indicating that defendant was selling drugs. Defendant told the police that he sold about one ounce of marijuana per week. Defendant also stated that he gave Ecstasy to friends but denied selling it.

When asked about the cash that the police found, defendant first stated that it was savings from his prior job as a server. When the police referred to the receipt with the bank transactions, defendant "changed his story." He said that he told a relative who lived out of the country that he was "having a hard time," and the relative sent him numerous checks to help him out. When the police asked defendant why he had so much cash with him, defendant stated that he did not like keeping his money in a bank. Defendant also indicated that the money was for college bills. He further stated that he had been unemployed for a while and was currently homeless.

The police believed defendant was under the influence of a stimulant. He had "[n]ervous speech," made rapid movements, was sweating, and had nonreactive pupils and a dry mouth. Defendant stated that he had not used Ecstasy in several weeks.

An expert on the use, possession, and sale of MDMA and marijuana testified that, based on a hypothetical set of facts reflecting the evidence in this case, the MDMA and marijuana were possessed for sales.

The jury found defendant guilty of possession for sale of MDMA (§ 11378; count 1) but not guilty of misdemeanor possession for sale of marijuana (§ 11359, subd. (b); count 2).

C. *The Sentencing*

According to the probation report, defendant was 20 years old and had not completed high school. He started smoking marijuana daily at age 17. At age 18, defendant started using cocaine and ecstasy. He reported that he last used cocaine in 2015, and he last used ecstasy in 2016. Defendant reported consuming alcohol on an occasional basis. He denied having a substance abuse problem.

Defendant indicated to the probation officer that he had been working as a "tea-rista" part-time for more than a year and earning $11.50 per hour. He had been employed until his recent incarceration. Upon his release from custody, defendant planned to live with his mother and find employment. He was willing to participate in mental health treatment.

The probation officer recommended that defendant be placed on probation with various conditions, including search conditions pertaining to electronic devices, to assist in preventing future criminality. The probation officer observed that defendant had used a cell phone to conduct his criminal activity. The probation officer also recommended that defendant be ordered to pay various fines and fees.

The sentencing hearing was held on November 9, 2017. Defendant did not object to any of the recommended probation conditions or fines and fees. The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve 201 days in county jail with 201 days credit. Other probation conditions included the following.

In an electronics search condition,[2] the trial court ordered that defendant consent to a "search of all electronic devices under [his] control for a search of any medium of communication reasonably likely to reveal whether [he is] involved with drugs" and provide any passwords necessary to access the information specified. The "media of communication include text messages, voicemail messages, photographs, e-mail accounts, call logs, and social media accounts; and applications relating to such accounts." Defendant's "computer and all other electronic device (including but not limited to cellular telephones, laptop computers or notepads)" are also subject to a "[f]orensic [a]nalysis search" if the search of those devices "would be reasonably likely to reveal whether the defendant is involved in drugs."

The trial court further ordered that defendant submit himself and his house, car, and property under his control to search at any time with or without a warrant. The court also ordered that defendant not knowingly possess or use any drugs without a valid prescription. He was ordered to submit to chemical testing, complete a substance abuse treatment program, and complete a psychological treatment program as directed by probation. The court also ordered that defendant maintain a job, go to school, or get academic or vocational training.

The trial court further ordered that defendant pay the following amounts: (1) a $150 drug program fee (§ 11372.7) plus penalty assessments, (2) a $25 per month probation supervision fee (Pen. Code, § 1203.1b), (3) a $50 criminal laboratory analysis fee (§ 11372.5) plus penalty assessments, (4) a $40 court operations assessment (Pen.

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[2] The trial court orally stated the terms and conditions of defendant's probation at the sentencing hearing. The electronics search condition is also contained in a written "attachment page" to the minutes of the sentencing hearing. (Capitalization omitted.) Defendant cites to both the court's oral pronouncement and the written recitation attached to the sentencing minutes. Defendant does not argue that any differences between the oral and written versions are material to his claim on appeal. We quote from the written "attachment page" in setting forth the electronics search condition. (Capitalization omitted.)

Code, § 1465.8), (5) a $30 court facilities assessment (Gov. Code, § 70373), (6) a $129.75 criminal justice administration fee (see Gov. Code, § 29550 et seq.), (7) a restitution fine of $330 (Pen. Code, § 1202.4), and (8) a suspended probation revocation restitution fine of $300 (Pen. Code, § 1202.44).[3]

After imposing these amounts, the trial court asked whether defendant had the ability to pay. Defense counsel responded, "I don't believe so." Immediately thereafter, the court asked defendant whether he understood and accepted the terms of probation. Defendant responded affirmatively.

The trial court ordered defendant to report to the Department of Tax and Collections "for the completion of a payment plan for fines and fees." At defense counsel's request, the court limited defendant's payments to $20 per month.

Defense counsel stated that there was "a clear mental health issue here" and requested that defendant be sent to "Palo Alto review" so defense counsel could "introduce" defendant to "services." The court agreed and scheduled a review hearing for November 14, 2017. At the review hearing, no further orders were made regarding defendant's probation.

III. DISCUSSION

A. *The Electronics Search Condition*

In granting probation and imposing certain probation conditions, the trial court observed that there was evidence at trial that defendant was "using his phone and other electronic devices [f]or sales of narcotics." The electronics search condition imposed by the court allows a "search of all electronic devices under [defendant's] control for a

[3] The trial court ordered penalty assessments on the $50 criminal laboratory analysis fee (§ 11372.5) and the $150 drug program fee (§ 11372.7) without specifying the amount of the penalty assessments or the statutory basis. "A detailed description of the amount of and statutory basis for the fines and penalty assessments imposed would help the parties and the court avoid errors in this area." (*People v. Hamed* (2013) 221 Cal.App.4th 928, 939.)

search of any medium of communication reasonably likely to reveal whether [he is] involved with drugs" and requires that he provide any necessary passwords. The "media of communication include text messages, voicemail messages, photographs, e-mail accounts, call logs, and social media accounts; and applications relating to such accounts." Defendant's "computer and all other electronic device (including but not limited to cellular telephones, laptop computers or notepads)" are also subject to a "[f]orensic [a]nalysis search" if the search of those devices "would be reasonably likely to reveal whether the defendant is involved in drugs."

Defendant contends that this electronics search condition is an "overbroad infringement[] on his rights to privacy, to free speech, and to be free of unreasonable searches and seizures" under the federal and state Constitutions. Although he did not raise a constitutional claim below, defendant argues that this court should exercise its discretion to address the issue. To the extent that the issue was forfeited, defendant contends that his trial counsel rendered ineffective assistance of counsel.

The Attorney General contends that defendant forfeited his claim because he failed to raise it below. The Attorney General further contends that the electronics search condition is not unconstitutionally overbroad.

1. General legal principles

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Significantly, a probationer "has a diminished expectation of liberty and privacy as compared to an ordinary citizen. [Citation.]" (*People v. Garcia* (2017) 2 Cal.5th 792, 810.) "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citation.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119 (*Knights*).)

With respect to a Fourth Amendment challenge to a search condition, "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*Knights*, *supra*, 534 U.S. at pp. 118-119.) Defendant's "status as a probationer subject to a search condition informs both sides of that balance." (*Id*. at p. 119.)

A defendant may raise for the first time on appeal a facial constitutional defect in a probation condition if the claim involves " ' "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citations.]' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 889; see also *id.* at p. 887; accord, *People v. Moran* (2016) 1 Cal.5th 398, 403, fn. 5.) A facial constitutional challenge to the "phrasing or language of a probation condition . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Sheena K.*, *supra*, at p. 885.)

In contrast, a constitutional defect that is "correctable only by examining factual findings in the record or remanding to the trial court for further findings" is subject to forfeiture if the claim was not raised in the trial court. (*Sheena K.*, *supra*, 40 Cal.4th at

p. 887.) In other words, not " 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' [Citation.]" (*Id*. at p. 889.)

2. Analysis

Defendant contends that the electronics search condition is overbroad in violation of his federal and state constitutional rights to privacy, to free speech, and to be free of unreasonable searches and seizures. He acknowledges that his cell phones contained text messages concerning drug sales.

Defendant nevertheless contends that the electronics search condition is unconstitutionally overbroad because his use of an electronic device to "deal drugs" was limited to "text messages on cell phones," and "[t]here is no evidence in the record" regarding "other electronic devices, or about photographs revealing drug involvement, or any use of social media accounts for drug dealing." He also contends that the probation condition is constitutionally overbroad because "[h]is electronic devices contain a treasure trove of private, non-incriminating information," and a search pursuant to the probation condition "will reveal vast amounts of private information." Although defendant acknowledges that the probation condition is limited to searches "reasonably likely to reveal" whether he is involved with drugs, he contends that "it is not practical to conduct limited searches of some of the information, like photographs." He contends that "an officer who is conducting a search of a device probably lacks the technology to pre-sort photographs before actually looking at them." Defendant argues that the "trial court should have tailored the searches more narrowly based on the specific facts of this case."

Defendant's overbreadth argument is based on the particular facts of his case. As his claim does not present a pure question of law that can be resolved without reference

to the particular record developed in the trial court or remanding for further factual findings, he forfeited the claim by failing to raise it below. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889; *People v. Smith* (2017) 8 Cal.App.5th 977, 987 [overbreadth claim to cell phone and computer probation search condition forfeited, where claim not raised below and depended on the record developed in the trial court]; *People v. Guzman* (2018) 23 Cal.App.5th 53, 63, fn. 3; cf. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 ["A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual"].)

Defendant contends that this court should exercise its discretion to resolve his claim on the merits regardless of whether his claim presents a pure question of law. He primarily relies on *In re P.O.* (2016) 246 Cal.App.4th 288 (*P.O.*), in which the appellate court reached a constitutional challenge to an electronics search condition even though the defendant had not objected below (*id.* at pp. 297-298),[4] and *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), in which the California Supreme Court noted that "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party" (*Williams*, *supra*, at p. 162, fn. 6).

Subsequent to *Williams*, however, the California Supreme Court explained: "[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.]" (*In re Seaton* (2004) 34 Cal.4th 193, 198.) " ' "[N]o

[4] In *P.O.*, the appellate court determined that the electronics search condition at issue in that case was reasonably related to the defendant's future criminality because it enabled probation officers to supervise him effectively (*P.O.*, *supra*, 246 Cal.App.4th at p. 295), but it concluded that the condition was unconstitutionally "overbroad in its authorization of searches of cell phones and electronic accounts accessible through such devices because it [was] not narrowly tailored to its purpose of furthering his rehabilitation." (*Id.* at p. 298.)

procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." ' [Citations.]" (*Sheena K.*, *supra*, 40 Cal.4th at pp. 880-881.)

" 'The purpose of [the forfeiture] rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]' [Citations.]" (*Sheena K.*, *supra*, 40 Cal.4th at p. 881, fn. omitted.) " '[I]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.] '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 46.)

We adhere to the forfeiture rule. We therefore turn to defendant's alternative contention that his trial counsel rendered ineffective assistance by failing to object to the probation condition below.

" 'In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must

show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).)

In this case, defendant's trial counsel may have reasonably concluded that probation with the electronics search condition was the best possible result for defendant. By the time of defendant's sentencing, the appellate court in *P.O.*, *supra*, 246 Cal.App.4th 288, in response to a contention of unconstitutional overbreadth, had modified an electronics search condition so that it was worded similar to the electronics search condition imposed in this case. (*Id.* at p. 291.) In *In re P.O.*, the minor admitted that he committed a misdemeanor count of public intoxication, but there was no evidence about his use of electronic devices. (*Id.* at pp. 292, 294.) The appellate court modified the electronics search condition to require, similar to the condition in this case, the submission of "all electronic devices under your control to a search of any medium of communication reasonably likely to reveal whether you are boasting about your drug use or otherwise involved with drugs, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified. Such media of communication include text messages, voicemail messages, photographs, e-mail accounts, and social media accounts." (*Id.* at p. 300.) Given the existence of case law approving an electronics search condition worded similarly to the probation condition in this case, defendant's "trial counsel could have reasonably concluded that the trial court would not have entertained an objection to the probation condition." (*People v. Kendrick* (2014) 226 Cal.App.4th 769, 779.)

Trial counsel may have also reasonably decided that it would not be prudent for defendant to object to probation with the electronics search condition and risk the trial court concluding that defendant would not be sufficiently supervised on probation if the electronics search condition was limited to the extent now urged by defendant on appeal.

For example, defendant contends on appeal that the electronics search condition should be limited to only allow "searches of communications—call logs, text messages, emails, and messages on other apps that allow communications—for messages that contain common drug slang." Defendant could easily circumvent this more limited probation condition by using an uncommon term or a new term for a drug. He also argues on appeal that the electronics search condition should not include photographs because he may have "never attache[d] [them] to communications" to share them. However, "[e]ven photographs can facilitate drug sales by depicting merchandise offered for sale, or by allowing mobile access to a photograph of a handwritten pay-owe sheet. Given the potential use of stored photographs for record keeping and similar activities, it would be too restrictive to limit the search of photographs to only those posted to social media or attached to messages sent or received." (*People v. Maldonado* (2018) 22 Cal.App.5th 138, 143, review granted June 20, 2018, S248800.) Defendant also contends on appeal that the electronics search condition should be limited to cell phones only, but such a limited probation condition could easily be circumvented by defendant using other electronic devices that are capable of communication. (See *id.* at pp. 141, 142-143.)

In sum, defendant fails to demonstrate that trial counsel's performance was deficient, or that there is a reasonable probability that, if trial counsel had objected, the result of the proceeding would have been different, that is, the trial court would have placed defendant on probation with an electronics search condition in the limited form defendant now urges on appeal. (See *Lopez*, *supra*, 42 Cal.4th at p. 966.)

B. *Ability to Pay the Drug Program Fee*

The trial court ordered defendant to pay, among other amounts, a $150 drug program fee (§ 11372.7) plus penalty assessments. The court asked whether defendant had the ability to pay, and defense counsel responded, "I don't believe so."

Defendant contends that there is not substantial evidence to support a finding that he had the ability to pay the drug program fee, especially in light of penalty assessments

and other amounts he is required to pay, which "adds up to well over $1000." He also argues that the ability-to-pay issue was raised below and that, to the extent the issue was forfeited, his trial counsel rendered ineffective assistance.

The Attorney General contends that defendant forfeited his claim by failing to request an ability-to-pay hearing. The Attorney General further argues that there was sufficient evidence of defendant's ability to pay the fee.

Section 11372.7 provides for a drug program fee of up to $150. (§ 11372.7, subd. (a).) Regarding a defendant's ability to pay, section 11372.7 states: "The court shall determine whether or not the person who is convicted of a violation of this chapter has the ability to pay a drug program fee. If the court determines that the person has the ability to pay, the court may set the amount to be paid and order the person to pay that sum to the county in a manner that the court believes is reasonable and compatible with the person's financial ability. In its determination of whether a person has the ability to pay, the court shall take into account the amount of any fine imposed upon that person and any amount that person has been ordered to pay in restitution. If the court determines that the person does not have the ability to pay a drug program fee, the person shall not be required to pay a drug program fee." (*Id.*, subd. (b).)

An " 'ability to pay' a drug program fee does not require existing employment or cash on hand. Rather, a determination of ability to pay may be made based on the person's ability to earn where the person has no physical, mental or emotional impediment which precludes the person from finding and maintaining employment." (*People v. Staley* (1992) 10 Cal.App.4th 782, 783 (*Staley*), italics omitted.) The defendant is in "the best position to know of and develop" information concerning "latent impediments" that would preclude the defendant from finding and maintaining productive employment. (*Id.* at p. 786.)

Section 11372.7 does not require the trial court to make an express finding regarding ability to pay. (*Staley, supra,* 10 Cal.App.4th at p. 785.) We review an ability-

to-pay determination for substantial evidence. (*People v. Corrales* (2013) 213 Cal.App.4th 696, 702.)

In this case, the trial court and defendant expressly addressed the issue of ability to pay, and substantial evidence supports the court's implied finding that defendant had the ability to pay the drug program fee. Regarding cash on hand, the evidence at trial reflected that defendant had cashed several checks totaling more than $10,000 a few days prior to his offense, and that he had approximately $9,800 in cash in his possession at the time he was contacted by the police. Defendant told the police that the checks were from a relative who was helping him out. The record further reflects that defendant was only 20 years old and had successfully maintained a job with one employer for more than a year until he was incarcerated for the instant offense. Although the probation report indicated that defendant may have mental health issues, there was no evidence to suggest that his condition had in the past, or would in the future, impede his ability to find and maintain productive employment. Indeed, defendant told the probation officer that he planned to live with his mother and find employment upon his release from custody. Defendant was ordered released from custody at the conclusion of the sentencing hearing. Moreover, as a condition of probation, defendant was ordered to maintain a job, go to school, or get academic or vocational training, and he voiced no objection to the court regarding his ability to fulfill this condition. Thus, even aside from the cash he had on hand, the record reflects that defendant has the ability to maintain productive employment. On this record, substantial evidence supports the trial court's ability-to-pay finding.

C. *Ability to Pay the Probation Supervision Fee*

The probation report recommended that defendant pay a presentence investigation fee not to exceed $450 and a probation supervision fee of no more than $110 per month. The trial court waived the presentence investigation fee and ordered defendant to pay a

probation supervision fee of $25 per month (Pen. Code, § 1203.1b). The court asked whether defendant had the ability, and defense counsel responded, "I don't believe so."

Defendant contends that there is not substantial evidence to support an implied finding by the trial court that he had the ability to pay the probation supervision fee. He also argues that he did not forfeit the ability-to-pay issue because it was raised below.

The Attorney General contends that defendant forfeited his claim by failing to request an ability-to-pay hearing. The Attorney General further argues that there was sufficient evidence of defendant's ability to pay the fee.

Penal Code section 1203.1b provides that "[t]he court shall order the defendant to pay the reasonable costs [of conducting any presentence investigation and of any probation supervision] if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative." (*Id.*, subd. (b); see *id.*, subd. (a).) "[I]f the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability." (*Id.*, subd. (b)(2).)

"[A]bility to pay" in Penal Code section 1203.1b means "the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, . . . and probation supervision . . . , and shall include, but shall not be limited to, the defendant's: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. . . . [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs." (*Id.*, subd. (e).) The court must also "take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution." (*Id.*, subd. (b)(3).)

The trial court waived the presentence investigation fee and ordered defendant to pay a probation supervision fee of $25 per month, which was less than that recommended by the probation officer. The court and defendant expressly addressed the issue of ability to pay. Substantial evidence supports the court's implied finding that defendant had the ability to pay the $25 per month probation supervision fee. As we explained regarding the drug program fee, defendant cashed several checks totaling more than $10,000 a few days prior to his offense, and he had approximately $9,800 in cash in his possession at the time the police contacted him. Defendant was only 20 years old and, despite any mental health issues, he had successfully maintained a job with one employer for more than a year until he was incarcerated for the instant offense. Defendant planned to live with his mother and find employment upon his release from custody, which the trial court ordered at the conclusion of the sentencing hearing. Defendant voiced no objection to the probation condition requiring him to maintain a job, go to school, or get academic or vocational training. On this record, substantial evidence supports the trial court's ability-to-pay finding.

D. *Ability to Pay Based on Dueñas*

As we recited above, the trial court ordered defendant to pay the following amounts:

1. a $150 drug program fee (§ 11372.7) plus penalty assessments,
2. a $25 per month probation supervision fee (Pen. Code, § 1203.1b),
3. a $50 criminal laboratory analysis fee (§ 11372.5) plus penalty assessments,
4. a $40 court operations assessment (Pen. Code, § 1465.8),
5. a $30 court facilities assessment (Gov. Code, § 70373),
6. a $129.75 criminal justice administration fee (see Gov. Code, § 29550 et seq.),
7. a restitution fine of $330 (Pen. Code, § 1202.4), and
8. a suspended probation revocation restitution fine of $300 (Pen. Code, § 1202.44).

In supplemental briefing, defendant contends that, based on *Dueñas*, *supra*, 30 Cal.App.5th 1157, which was decided after defendant was sentenced in this case, the trial court violated his due process rights under the California and federal Constitutions by failing to make an ability-to-pay determination before imposing any monetary obligations. Defendant requests that the trial court be ordered to stay execution of the restitution fines (Pen. Code, §§ 1202.4, 1202.44) until a determination is made as to his ability to pay, and that the court's order requiring him to pay all other amounts be reversed with directions that the court consider his ability to pay before imposing those amounts. Defendant contends that he did not forfeit this claim and that, to the extent the claim was forfeited, counsel rendered ineffective assistance of counsel.

The Attorney General contends that defendant forfeited his claim, that defendant cannot establish ineffective assistance of counsel, and that the claim fails on the merits.

In *Dueñas*, the defendant at sentencing requested a hearing to determine her ability to pay various amounts that were imposed by the trial court. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1162.) At a subsequent ability-to-pay hearing regarding attorney's fees, the court reviewed the defendant's "uncontested declaration concerning her financial circumstances." (*Id.* at p. 1163.) The court waived attorney's fees based on the defendant's indigence but rejected her constitutional claim that due process required the court to consider her ability to pay other fines and assessments. (*Ibid.*)

On appeal, the appellate court held that under the California and federal Constitutions, "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas, supra*, 30 Cal.App.5th at p. 1164; see *id.* at p. 1168.) The appellate court further held regarding restitution fines that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any

restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid.*)

As we set forth above, section 11372.7 requires the trial court to determine whether a defendant has the ability to pay a drug program fee (*id.*, subd. (b)), and Penal Code section 1203.1b requires the court to determine whether a defendant has the ability to pay part or all the costs of probation supervision (Pen. Code, § 1203.1b, subds. (a) & (b)). As we have explained, substantial evidence supports the trial court's implied determination that defendant has the ability to pay the drug program fee and the monthly probation supervision fee.

Regarding the other amounts ordered by the trial court, defendant did not expressly object to their imposition. The Courts of Appeal have reached conflicting conclusions regarding whether a due process claim under *Dueñas* is forfeited if the defendant failed to object in the trial court to the imposition of a fine, fee, or assessment. (See, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [not forfeited]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 [forfeited]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeited]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 (*Johnson*) [not forfeited], petn. for review pending, petn. filed June 11, 2019, time for grant or denial of review extended to Sept. 9, 2019; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [forfeited], petn. for review pending, petn. filed July 15, 2019; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1031-1034 (*Jones*) [not forfeited], petn. for review pending, petn. filed July 31, 2019.)

We need not decide whether defendant forfeited his due process claim regarding the trial court's purported failure to consider his ability to pay amounts other than the drug program fee and the monthly supervision fee. We also need not determine whether *Dueñas* was correctly decided. (See *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1038 (conc. opn. of Benke, Acting P. J.) [analysis in *Dueñas* is incorrect and

"fundamentally flawed"].) As we will explain, any error in the trial court's purported failure to consider defendant's ability to pay amounts other than the drug program fee and the monthly supervision fee was harmless.

In evaluating a trial court's failure to make an ability to pay determination and a defendant's due process challenge based on *Dueñas*, the appellate courts have applied the standard of error set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), that is, whether the error was harmless beyond a reasonable doubt. (*Johnson*, *supra*, 35 Cal.App.5th at pp. 139-140, petn. for review pending, petn. filed June 11, 2019, time for grant or denial of review extended to Sept. 9, 2019; *Jones*, *supra*, 36 Cal.App.5th at p. 1035, petn. for review pending, petn. filed July 31, 2019.) In this case, as we have explained, defendant had approximately $9,800 in cash in his possession at the time of his arrest. He was only 20 years old and, despite any mental health issues, he had successfully maintained a job with one employer for more than a year until he was incarcerated for the instant offense. Defendant planned to live with his mother and find employment upon his release from custody, which the trial court ordered at the conclusion of the sentencing hearing. Defendant voiced no objection to the probation condition requiring him to maintain a job, go to school, or get academic or vocational training. The record thus amply supports the conclusion that defendant had a staggering amount of cash on hand and has the ability to earn through future employment. Moreover, the trial court, in making an ability-to-pay determination regarding the drug program fee and the monthly probation supervision fee, was required to take into account the amount of any other fine or restitution defendant was ordered to pay. (Penal Code, § 1203.1b, subd. (b)(3); § 11372.7, subd. (b).) Thus, in determining that defendant had the ability to pay the drug program fee and the monthly probation supervision fee, the trial court would have necessarily determined that defendant had the ability to pay other ordered fines. On this record, we determine that, to the extent the trial court failed to consider defendant's ability to pay a particular fine, fee, or assessment, and to the extent

that failure violated defendant's right to due process, any such error was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, at p. 24; *Johnson*, *supra*, 35 Cal.App.5th at pp. 139-140, petn. for review pending, petn. filed June 11, 2019, time for grant or denial of review extended to Sept. 9, 2019; *Jones*, *supra*, 36 Cal.App.5th at p. 1035, petn. for review pending, petn. filed July 31, 2019.)

Lastly to the extent defendant contends that trial counsel was ineffective for failing to "develop . . . further" the argument that defendant did not have the ability to pay some or all of the ordered amounts, for failing to request a further hearing on the issue, or for failing to raise a due process argument, defendant fails to establish his claim for ineffective assistance. Trial counsel indicated to the trial court, "I don't believe [defendant has the ability to pay]." On appeal, defendant acknowledges that trial counsel "might not have had any additional evidence or argument to present" beyond what was disclosed in the probation report. Based on the record, defendant fails to establish that trial counsel's performance was deficient, or that there is a reasonable probability that the result of the proceeding would have been different had counsel further argued the ability to pay issue. (*Lopez*, *supra*, 42 Cal.4th at p. 966.)

IV. DISPOSITION

The order of probation is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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